“What Do You Expect From Me?”

A Mediator’s Candid Conversations with her Clients © 2016

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Suzanne Mann Duvall
Burdin Mediations
4514 Cole Avenue, Suite 1450
Dallas, Texas 75205
OFF: (214) 528-1411
FAX: (214) 528-2070
Direct: (214) 361-0802

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By

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Several years ago, the American Bar Association conducted a study to determine what clients expected from their lawyers and asked those clients to rate those expectations in order of importance. The predicted results were that the clients were interested in (1) a quality legal product (2) at a fair price.

The results were surprising and not at all as predicted by the ABA. It turned out that the most important attributes clients looked for in a lawyer were (1) one who listens, (2) who cares and (3) who returns telephone calls. Given these qualities, the price for such legal services was held to be of little consequence by the clients.

It was because of a similar curiosity that I decided to conduct an informal survey to determine my client’s expectations of me and of my fellow mediators. Unlike the ABA, I had no pre-determined ideas or predictions of what those expectations would be.

Since I wanted my clients (who are lawyers and governmental agencies throughout Texas and the country) to be open and expansive, I conducted my survey by personal interviews, either by telephone or in person. In other words, I had “candid conversations” with those with whom I had worked over my mediation career.

There was no magic in my selection process. I simply made a list of two hundred of my clients and hoped that at least half would be willing to be interviewed. I was not disappointed. I found everyone with whom I spoke eager to do so. The conversations that I had expected to last ten or

fifteen minutes sometimes went on for over an hour and routinely, lasted for thirty to forty-five minutes.

My "subjects" were mostly experienced lawyers but also included governmental agency personnel who use mediation services. Most are at the top of their profession or "rising stars". Of the practice areas interviewed, 42% were family lawyers, 30% labor and employment lawyers, 20% business/commercial civil lawyers, 15% governmental agencies personnel, and 7% personal injury lawyers (the total is more than 100% because of overlapping practice areas).

My goal was to determine their views, as users of mediation services, of what we, as mediators, are doing right, what we are doing wrong, what course the mediation of lawsuits and other disputes will take over the next five years and most importantly, "what do you expect from me (us)?".

My conversational framework consisted of the following questions:

1. How often do you use the services of a mediator?
2. Do you most often decide to go to mediation by agreement or as ordered by the court?
3. In selecting a mediator by agreement, what criteria do you use?
4. Identify some of the most effective mediator techniques you have experienced in mediation.
5. Identify some of the least effective mediator techniques you have experienced in mediation.
6. What are some of your biggest mediation-related success stories?
7. Do you have any mediation-related horror stories? If so, what are they?
8. Over the course of the past year, have you experienced an increase or decrease in case resolution through mediation? To what do you attribute these results?

9. What do you see as the role of mediation over the next five years?
10. "What do you expect from me and/or from us"? That is, what can mediators do going forward to effectively accommodate your needs and the needs of your clients?

The results, while not startling, were at least surprising, to some extent. Individual lawyers interviewed use the services of a mediator from a minimum of one time per year to a maximum of "in every case" for governmental agencies. Most were in mediation six to ten times per year. The majority of the lawyers surveyed went to mediation by agreement more often than not: that is, at least 70% of the time. Family law practitioners interviewed chose, almost without exception, to mediate by agreement without being ordered to do so by the courts. Overall, even those mediators who went to mediation solely by court order (13%), as well as those who reported that they went to mediation by court order "two or three times out of ten", acknowledged that their usual practice was to agree with opposing counsel to "swap out" the Court-appointed mediator in favor of a mediator selected by mutual agreement 70% to 80% of the time.

The standards and criteria used to select the mediator vary widely. Most frequently used criteria in selecting a mediator, in order of importance are:

1. Attempt to match the personalities of the mediator, the lawyers and the clients;
2. The mediator's subject matter expertise, that is, the mediator's knowledge of the law, the judges, the courts, and the expert witnesses, if any;
3. Lawyers who allow the opposing counsel to select the mediator on the theory that there will be a greater likelihood for settlement if opposing counsel has confidence in the mediator;

4. A four-way tie among (a) the mediator's level of experience, (b) the "marquee mediator", the "go-to" mediator, the mediator with a well-known reputation for excellence, (c) prior experience with a particular mediator and (d) a mediator who is perceived to be skilled, competent, candid and fair;
5. Prior results/successes with a mediator;
6. Mediator availability, and
7. Food! Yes, food!

One of the most intriguing results of my candid conversations involve the question of the most effective mediator techniques. Far-and-away (59%) the most effective techniques noted involved the mediator's inter-personal, communication and process skills. In order of importance those skills cited were:

1. Overall communication skills including questioning techniques "live in the question" "ask don't tell" and story-telling;
2. Empathy, the ability to establish trust and provide a comfort level;
3. "Being there"; that is, be hard-working, engaged and involved:
4. Listening skills;
5. Creativity;
6. Flexibility – the ability to suit the mediator's style to fit the case; and
7. A three-way tie – (a) competence in standard mediator techniques (b) patience – "an ability to keep us there" and (c) objectivity, impartiality, neutrality.

The remaining 41% of the most effective mediator techniques involved the mediator's skills in negotiation and legal skills. They are:

1. An ability to conduct an assertive risk-evaluation process with all parties in the mediation including the lawyers' own clients;
2. The ability to actively involve the clients by asking (a) probing questions that test unrealistic expectations and to (b) brainstorm and make suggestions as to possible solutions to the problems involved;
3. Subject matter knowledge and expertise;
4. (A distant fourth) Strategic use of the mediator's proposal; and a two-way tie for an even-more distant fifth;
5. (a) use of bracketing and "stretch" numbers: and (b) the ability to "give it to me straight" – but only *if the mediator is perceived to be competent*.

Chief among the least effective mediator techniques, the runaway, number one is the mediator who is confrontational, the screaming mediator, the mediator who resorts to bullying clients and/or their lawyers. A not-too-distant second is the uninvolved mediator; the "mail it in" "water-carrying" mediator. Other least effective techniques cited are:

1. (Three-way tie) (a) the obviously judgmental, biased mediator (b) mediators who lack even the most basic skills and "waste my time" and (c) mediators who have poor session control;
2. (Three-way tie) (a) Burned-out, "cookie-cutter" mediators, (b) rigid, inflexible mediators, and (c) mediators who refuse to listen and have poor communication skills;
3. Lack of knowledge of the law and/or the Courts and/or the judges;
4. (Three-way tie) (a) Use of bracketing and/or mediator proposals, (b) failure to relay offers, and (c) using the "the last place you want to end up is in the courtroom" argument and

5. (Three-way tie) (a) Former Judge-mediators who play the "judge card", (b) mediators who fail to read and be acquainted with the submitted materials and (c) mediators who betray confidential information.

Assertive mediators, mediators who have had an extensive legal practice in a particular body of law, mediators "who have been to the courthouse and know what's going to happen down there" – these are the qualities often cited as those sought by attorneys when deciding upon one mediator over another. Thus, it is particularly ironic that, when asked to describe their most memorable mediation success stories, the cases they never thought would settle, and what made them so, lawyers most often told of experiences that had nothing to do with any of those qualities. Instead, those polled cited cases of mediator persistence, patience, and the willingness to listen to and empathize with the parties; cases which turned on "difficult emotional factors rather than any legal factors"; cases in which the mediator was able to suggest creative, non-monetary solutions *unavailable* at the courthouse; cases in which the mediator was willing to be flexible and to change her methodology when a particular approach was ineffective; and cases in which the mediator encouraged the parties to speak face-to-face and to discover their own solutions, none of which were based on legal theories. In my candid conversations, clients spoke particularly warmly about their fondly remembered success stories which they could recall in some degree of detail even though they may have occurred some time ago.

It should be added that my surveyed clients were very praiseworthy of what they referred to as "service after the sale." That is to say, follow-up by the mediator *after* the mediation session. This was especially appreciated and valued by my clients in cases that did not settle at the mediation but the mediator continued to work with the attorneys and parties to achieve resolution.

Are there horror stories? Absolutely and, unfortunately, they are too-often remembered in some degree of detail even though they may have occurred sometime ago. Those recalled include (1) mediator inattention (extreme examples include a mediator who persists in falling asleep during the mediation, and a retired judge-mediator who was so drunk during the mediation that he/she passed out leaving the lawyers and their clients to settle the case without him/her), (2) mediators who yell and scream obscenities at lawyers and their clients. (One such mediator cited by three different attorneys habitually screams at clients "I'm going to rip your head off and stick it up your ass!"); (3) mediators who do nothing more than "carry water" – the uninterested and uninvolved mediator who wastes the parties' time and money through their passivity, (4) mediators who divulge confidences, (5) mediators with no subject-matter expertise or knowledge of the law who make "over-the-top" statements about the law or the facts (6) mediators who do not control the process and (7) mediators who blatantly disregard the Ethical Rules and/or Guidelines for Mediators and Mediations. All parties polled, however, suggest that these cases stand-out only because they are so outrageous and are seldom-seen occurrences.

Over the past year, my clients report mixed-results to the question "Have you experienced an increase or decrease of case resolutions through mediation?" Of those polled, 34% report a slight increase, thirty-four percent report a decrease and 32%report that their results have remained the same. The number one rationale for both the decrease and the increase is the prevailing economic conditions; apparently, it works both ways. Clients report that it is either too expensive to litigate and that parties are eager to settle or that, because of the economy, lawyers are holding onto cases longer to assure their stream of income. Other causes cited for an increase is the cadre of new, unknown judges and the availability of better skilled mediators. Decreases are often attributed to

"cases that just need to be tried", "we're getting clients who are more messed up" and the ever-popular "unrealistic expectations".

Well, then, where do we go from here? Fifty-nine percent of those surveyed believed that the role of mediation in the next five years will remain the same. "It's institutionalized; it's a routine part of the litigation process and an important case-management tool." Thirty-nine percent believe that mediation will play an even more important role because "it is the most effective way to resolve disputes in the legal system, especially in family law – no one can afford litigation." Interestingly enough, 2% believe (and even hope) that mediation will become less important because of their belief that mediation will be the destruction of the legal process "as we know it" as it "…abridges the constitutional right of trial by jury creating a change from a democracy to an oligarchy – and arbitration is even worse!"

Up to this point, my "candid conversations" have been about the "interviewees" experiences with mediation and with mediators, but I saved my most important question until the last: "What do you expect from me and/or from *us*?" That is, what can we mediators do going forward to effectively accommodate the needs of our clients, and, by extension, their clients – the parties in mediation?

This informal survey tells me that we can and should be pro-active. We can be more assertive without being coercive. We can become better educated in those areas of the law in which we seek to serve as neutrals. We can continue to develop our creative skills, our process skills, and our communications skills in order to remain effective not only in risk-analysis, but also in the more ephemeral qualities that go into effective case resolution. We can be open and flexible to new ways to do old tricks, such as (as was suggested by several family law and employment layers) giving consideration to mediating over several short sessions in order to allow "sinking-in time" when life-altering decisions are made, such as those involved in family and employment cases. We can continue to be

enthusiastic and involved, remembering, for instance, that although we may have recited an opening statement several hundred times, it is the parties' first time to hear it; therefore, we should keep it fresh and meaningful for them.

I'd like to leave you with a list of some of responses that recurred most frequently (in order of importance):

1. Do your job and be good at it. Mediation isn't magic; its work. Do it! Continue to do what you're doing and do it well;
2. Be able to communicate effectively. Listen!;
3. A good mediator will bring a lot to the table. Know the "playground", the issues, the law, the judges, and the courts;
4. Go back to the basics. If you need to, take a refresher basic course. Practice being intuitive;
5. Care enough to stay engaged and involved. Don't be shy. Get the attorneys and the clients engaged and involved. Help the attorneys educate their clients;
6. Be mindful of client and lawyer needs and comfort; consider a sliding-fee scale based on income or a "store-front" office. Read the materials provided by the lawyers. Have a pre-mediation conference with the lawyers. If the case doesn't settle, follow-up!;
7. Have <u>good</u> food. All things being equal, clients choose the mediator with the best food;
8. Don't arbitrate! Mixing a good relationship (as a mediator) with a bad relationship (as an arbitrator) is not a good idea. "I'll never mediate again with a mediator who ruled against me in an arbitration", is something to think about.
9. Remember it's all about the underlying emotions for both parties regardless of what the case might be about;
10. If it's been awhile since you've been to the courthouse, take a trip, watch a trial, get a feel for the place. You may be

surprised what's happened down there since you tried your last case; and,

11. Above all, maintain the highest degree of integrity in order to ensure that both the parties and their attorneys have the utmost trust and confidence in both you as the mediator and in the mediation process.